FILED
FEB 3 1995

No. 94-1185

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF CHANUTE, KANSAS, *et al.*,
Petitioners,

v.

WILLIAMS NATURAL GAS COMPANY,
Respondent.

On Petiton for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSTION

DONALD W. BOSTWICK
TERESA JAMES
ADAMS, JONES, ROBINSON & MALONE, Chartered
600 Market Centre
155 North Market
P.O. Box 1034
Wichita, Kansas 67201
(316) 265-8591

JOHN T. SCHMIDT *
C. KEVIN MORRISON
CONNER & WINTERS
2400 First National Tower
15 East Fifth Street
Tulsa, Oklahoma 74103
(918) 586-5711

Attorneys for Respondent

DAVID J. BATOW
WILLIAM J. SEARS
THE WILLIAMS COMPANIES, INC.
One Williams Center
P.O. Box 3288
Tulsa, Oklahoma 74101
(918) 588-4229

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether this Court should deny its discretionary certiorari review when the decisions below relied extensively on the finding of fact by the District Court that the natural gas transportation service Petitioners receive from Respondent is not the result of this litigation, which finding cannot be set aside unless clearly erroneous.

2. Whether the Petitioners could be considered "substantially prevailing parties" after a final judgment finding their antitrust claims to have been meritless from the outset, and when they obtained no relief from a preliminary injunction improvidently granted.

LIST OF PARTIES AND RULE 29.1 LISTING

There were no parties to this action below other than those identified in the caption of this Brief. Respondent Williams Natural Gas Company is a wholly-owned subsidiary of The Williams Companies, Inc. Other subsidiaries of The Williams Companies, Inc. which are not wholly-owned by that corporation are as follows:

Apco Argentina, Inc.
Kern River Gas Supply Corporation
Kern River Service Corporation
Texasgulf, Inc.
Northern Border Partners, L.P.
Northern Border Intermediate Limited Partnership

In addition, The Williams Companies, Inc. recently acquired a majority of the shares of Transco Energy Company pursuant to a tender offer, but that company has not yet been merged into The Williams Companies, Inc. The subsidiaries of Transco Energy Company which are not wholly-owned by that corporation are as follows:

Border Gas, Inc.
NESP Supply Corporation
Trans-Jeff Chemical Corporation
Tubexpress, Inc.
Enfuels Corporation
FST Holdings, Inc.
Fleetstar of Texas, L.C.
TRANSTAR Technologies, L.C.

TABLE OF CONTENTS

QUESTIONS PRESENTED . . . . . (i)
RULE 29.1 LISTING . . . . . (ii)
TABLE OF AUTHORITIES . . . . . (iv)
OPINIONS BELOW 1
JURISDICTION 2
STATEMENT OF THE CASE 3
REASONS FOR DENYING THE WRIT 8

I. THE COURT OF APPEALS' DECISION IS COMPLETELY IN ACCORDANCE WITH THE LAW AND DOES NOT CONFLICT WITH A PRIOR DECISION OF ANY COURT 9

II. THE CITIES DID NOT ESTABLISH THAT THEY ARE ENTITLED TO AN AWARD OF ATTORNEY'S FEES 15

A. The District Court's Decision Was Based Entirely On A Finding Of Fact Subject To A Clearly Erroneous Standard Of Review 17

B. The District Court's Finding That The Transportation Service The Cities Receive Is Not The Result Of This Litigation Is Not Clearly Erroneous . . . 18

C. The Cities' Antitrust Claims Were Without Merit From The Outset 21

CONCLUSION 23

TABLE OF AUTHORITIES

CASES: United States Supreme Court

Berenyi v. District Director, INS, 385 U.S. 630 (1967) 17
Branti v. Finkel, 445 U.S. 507 (1980) 17
Farrar v. Hobby, 506 U.S. ___, 113 S.Ct. 566 (1992) 12, 13, 16
Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) . . . 17
Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 18
Hensley v. Eckerhart, 461 U.S. 424 (1983) 15
Hewitt v. Helms, 482 U.S. 755 (1987) 13
NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984) 17
Rhodes v. Stewart, 488 U.S. 1 (1988) 13
Rogers v. Lodge, 458 U.S. 613 (1982) 17
Texas State Teachers Ass'n v. Garland Indep. School Dist., 489 U.S. 782 (1989) 15
United States v. Doe, 465 U.S. 605 (1984) 17
United States v. New York Tel. Co., 434 U.S. 159 (1977) 18
Whitley v. Albers, 475 U.S. 312 (1986) 18

CASES: United States Courts of Appeals

City of Chanute v. Williams Natural Gas Co., 31 F.3d 1041 (10th Cir. 1994) 2, 4, 21

City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir.), *cert. denied*, ___ U.S. ___ (1992) 3, 7
City of Malden v. Union Elec. Co., 887 F.2d 157 (8th Cir. 1989) 9, 10, 22
Dahlem v. Board of Education, 901 F.2d 1508 (10th Cir. 1990) 14
Foremaster v. City of St. George, 882 F.2d 1485 (10th Cir. 1989), *cert. denied*, 495 U.S. 910 (1990) 15
Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Social & Rehabilitation Services, 31 F.3d 1052 (10th Cir. 1994) 22
Lundgrin v. Claytor, 619 F.2d 61 (10th Cir. 1980) 12
Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) . . . 15
Royal Crown Cola Co. v. Coca-Cola Co., 887 F.2d 1480 (11th Cir. 1989), *cert. denied*, 497 U.S. 1011 (1990) 18
Southwest Marine, Inc. v. Campbell Indus., 732 F.2d 744 (9th Cir.), *cert. denied sub nom, Triple "A" Machine Shop, Inc. v. Southwest Marine, Inc.*, 469 U.S. 1072 (1984) 11
Southwest Marine, Inc. v. Campbell Indus., 796 F.2d 291 (9th Cir. 1986), *opinion amended*, 806 F.2d 898 (9th Cir. 1986), *reh'g denied*, 811 F.2d 501, 503 (9th Cir.), *cert. denied sub nom., Triple A Mach. Shop, Inc. v. Southwest Marine, Inc.*, 484 U.S. 895 (1987) 9, 22, 23
Southwest Marine, Inc. v. Campbell Indus., 806 F.2d 898 (9th Cir. 1986) 12
Southwest Marine, Inc. v. Campbell Indus., 811 F.2d 501 (9th Cir.), *cert. denied sub nom, Triple A*

Mach. Shop, Inc. v. Southwest Marine, Inc., 484 U.S. 895 (1987) 12
Supre v. Ricketts, 792 F.2d 958 (10th Cir. 1986) 22
United Handicapped Fed'n v. Andre, 622 F.2d 342 (8th Cir. 1980) 10

CASES: United States District Courts

City of Chanute v. Williams Natural Gas Co., 678 F. Supp. 1517 (D. Kan. 1988) 3
City of Chanute v. Williams Natural Gas Co., 743 F. Supp. 1437 (D. Kan. 1990), *aff'd*, 955 F.2d 641 (10th Cir.), *cert. denied*, ___ U.S. ___ (1992) 3, 6, 7
City of Chanute v. Williams Natural Gas Co., 820 F. Supp. 1290 (D. Kan. 1993), *aff'd*, 31 F.3d 1041 (10th Cir. 1994) 2-8, 17, 20
City of Chanute v. Williams Natural Gas Co., 1990-1 Trade Cas. ¶ 68,967 (D. Kan. 1990), *aff'd*, 955 F.2d 641 (10th Cir.), *cert. denied*, ___ U.S. ___ (1992) 3, 7
F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc., 476 F. Supp. 203 (S.D.N.Y. 1979) 16
Harnischfeger Corp. v. PACCAR, Inc., 503 F. Supp. 102 (E.D. Wis. 1980) 16
Southwest Marine, Inc. v. Campbell Indus., 796 F. Supp. 291 (S.D. Cal. 1985), *aff'd*, 796 F.2d 291 (9th Cir. 1986), *cert. denied sub nom. Triple A Mach. Shop, Inc. v. Southwest Marine, Inc.*, 484 U.S. 895 (1987) 11

State of Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co., 730 F. Supp. 826 (C.D. Ill. 1990), *aff'd*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1169 (1992) 5

Constitutional Provisions, Statutes, and Rules

15 U.S.C. § 717c 4
28 U.S.C. § 2101 2
Clayton Act § 4, 15 U.S.C. § 15 9
Clayton Act § 16, 15 U.S.C. § 26 9
Supreme Court Rule 14 2

Administrative Materials

FERC Order No. 436, 50 Fed. Reg. 42,408 (1985) 5
Williams Natural Gas Co., 48 F.E.R.C. (CCH) ¶ 61,057 (1989) 20

No. 94-1185

IN THE

Supreme Court of the United States

CITY OF CHANUTE, KANSAS, *et al.*,

Petitioners,

v.

WILLIAMS NATURAL GAS COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

The Respondent, Williams Natural Gas Company ("WNG"), respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Tenth Circuit. That decision affirmed the Memorandum and Order of the United States District Court for the District of Kansas denying the Petitioners' application for attorney's fees. The Petitioners will be referred to herein, as they were by the

Courts below, as "the Cities." The opinions below are published at 31 F.3d 1041 (10th Cir. 1994), and 820 F. Supp. 1290 (D. Kan. 1993).

JURISDICTION

The Petition correctly cites the controlling jurisdictional statutes, but omits the dates of the orders and opinions below which determine whether the Petition for Certiorari was timely filed. The District Court entered its Memorandum and Order denying the Cities' application for attorney's fees on February 18, 1993. The Court of Appeals' opinion affirming the District Court was filed on August 8, 1994, and the Cities' Petition for Rehearing was denied on September 8, 1994. Therefore, the present Petition for Writ of Certiorari was due to be filed on December 7, 1994. 28 U.S.C. § 2101(c).

The Petition served on Respondent, however, was not received until December 12 and did not include an Affidavit of Mailing. Therefore, Respondent does not know whether the Petition was timely filed. Furthermore, the Petition actually filed failed to include a copy of the District Court Memorandum and Order as required by Supreme Court Rule 14.1(k)(ii). The Cities did not file a Supplemental Appendix including the omitted decision until January 5, 1995. Hence, it is unclear whether the Petition was filed in a timely manner such as to properly invoke this Court's Certiorari jurisdiction pursuant to 28 U.S.C. § 2101.

STATEMENT OF THE CASE[1]

This lawsuit has been pending for more than seven years and as noted in footnote 1, has been the subject of six published decisions. Throughout that time, the Cities have not received a single item of relief. The action began on August 3, 1987, two days after WNG suspended its interim open-access transportation program, when the Cities filed their original Complaint alleging the suspension violated the Sherman Act. The Cities also moved for a temporary restraining order ("TRO"), which was denied on August 7, 1987.

On August 18, 1987, the Cities moved for a preliminary injunction requiring WNG to resume the interim open-access program. After ten days of hearings, the District Court granted the Cities' motion by written order filed on February 5, 1988. *Chanute I,* 678 F. Supp. 1517 (D. Kan. 1988). WNG immediately appealed the preliminary

---

[1] As Judge Tacha noted in the Court of Appeals' decision, the historical background of this case has already been set out in several court opinions. *See City of Chanute v. Williams Natural Gas Co.*, 678 F. Supp. 1517 (D. Kan. 1988) ("*Chanute I*"), *City of Chanute v. Williams Natural Gas Co.*, 1990-1 Trade Cas. ¶ 68,967 (D. Kan. 1990) ("*Chanute II*"), and *City of Chanute v. Williams Natural Gas Co.*, 743 F. Supp. 1437 (D. Kan. 1990) ("*Chanute III*"), both *aff'd*, 955 F.2d 641 (10th Cir.) ("*Chanute IV*"), *cert. denied*, ___ U.S. ___ (1992). More particularly, both of the decisions below outlined that history in the context of the standards applicable to the present attorney's fees application. *See City of Chanute v. Williams Natural Gas Co.*, 820 F. Supp. 1290 (D. Kan. 1993) ("*Chanute V*"), *aff'd*, 31 F.3d 1041 (10th Cir.) ("*Chanute VI*"). WNG will only briefly address here the basic events leading up to the Cities' application for attorney's fees since they are important to the fact-based arguments WNG puts forth later.

injunction, and on March 3, 1988, the Court of Appeals stayed the preliminary injunction pending oral argument.[2] *See Chanute V*, 820 F. Supp. at 1290, Sup. App. at 25a. Between February 5, 1988 and the Tenth Circuit's stay, the Cities did not request, nor did WNG provide, any transportation service pursuant to the preliminary injunction. *Chanute V*, 820 F. Supp. at 1292, Sup. App. at 29a.[3]

---

[2] The Cities state in their Petition that this Court stayed the preliminary injunction, Petition at 4, but that simply is not true. This Court's only involvement in this case to date has been to deny the Cities' Petition for a Writ of Certiorari after the judgment in favor of WNG on the merits was affirmed. It was a panel of the Tenth Circuit Court of Appeals which stayed the preliminary injunction before it could go into effect. *See Chanute VI*, 31 F.3d at 1044, App. at 5a. In addition to that error, the reproduction of the Court of Appeals' opinion in the Cities' appendix contains numerous errors. For instance, the Cities' appendix states that the Court of Appeals held that "a party *must* be awarded attorneys' fees where it has received 'at least some relief on the merits of [its] claim' by judicial determination." App. at 13a (emphasis added). In fact, the Court of Appeals said that "a party *may* be awarded attorneys' fees" in that circumstance, a clearly different meaning. 31 F.3d at 1047, App. at 13a (emphasis added). *See also* note 9 *infra*. WNG suggests that the reader would be better served to refer to the reproduction of the opinion in West Publishing's Federal Reporter rather than the Cities' Appendix.

[3] Without citation, the Cities falsely state that "[l]ater WNG dropped [its] claim" that implementing the preliminary injunction could have resulted in as much as $100 million take-or-pay contract exposure to WNG. WNG remains as certain today as it was in 1988 that implementing the preliminary injunction would have required WNG to resume open-access transportation to all its sales customers as a result of the Natural Gas Act's anti-discrimination provision, 15 U.S.C. § 717c(b). Based on its sales customers' elections to cease purchases of gas from WNG during the interim open-access program, WNG knew continuing that transportation program would have made it impossible for WNG to

(continued...)

WNG operates an interstate natural gas company subject to pervasive regulation by the Federal Energy Regulatory Commission ("FERC"). For decades WNG had been principally a merchant of gas, buying it in producing areas and reselling it in its market areas primarily in Kansas and Missouri. More than a year before the Cities filed this lawsuit, WNG had initiated FERC proceedings for an open-access transportation program to achieve the transition envisioned in FERC Order No. 436, 50 Fed. Reg. 42,408 (1985). Order No. 436 began the process of converting the nation's interstate pipelines from their traditional role of being principally a merchant of gas to a combined role of merchant and transporter of gas owned by others. *See Chanute III*, 743 F. Supp. at 1452-53.[4]

WNG filed with FERC a Stipulation and Agreement ("S&A") which WNG had negotiated with its major customers and others in July, 1986 (more than a year before this suit) to establish the open-access program. *See Chanute V*, 820 F. Supp. at 1292, Sup. App. at 29a. Unfortunately, in February, 1987 the FERC substantially modified the S&A by removing much of the protection to WNG from exposure to

---

[3] (...continued)
meet its gas purchase obligations, thereby exposing WNG to many millions of dollars of contract liability.

[4] The court's decision in *State of Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.*, 730 F. Supp. 826 (C.D. Ill. 1990), *aff'd*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1169 (1992), contains an exhaustive discussion of the regulatory history and transformation of the natural gas industry brought about by FERC Order No. 436. The District Court relied heavily on that discussion in the summary judgment rulings in this case.

liability under take-or-pay clauses in WNG's own gas purchase contracts, thus making the permanent open-access transportation program financially infeasible. *Id.*

WNG nevertheless continued the regulatory process, attempting to address the FERC's concerns while minimizing WNG's potential for significant take-or-pay exposure. Even while the hearings on the Cities' motion for preliminary injunction were being conducted in the District Court, WNG representatives continued the regulatory process, resulting in a Revised Stipulation and Agreement ("RS&A") filed at FERC nearly a month before the District Court's order of preliminary injunction. *See Chanute III*, 743 F. Supp. at 1456. The RS&A included tariff provisions by which WNG sought authorization to perform the transportation service desired by its customers, including the Cities.

Just prior to the scheduled date for oral argument in the Tenth Circuit on WNG's appeal of the preliminary injunction, FERC approved the RS&A. *See Chanute V*, 820 F. Supp. at 1290-91, Sup. App. at 25a-26a. WNG then filed the new tariffs contemplated by the RS&A, and they too were approved on July 19, 1988, thereby clearing the way for WNG to become a non-discriminatory, open-access transporter under a permanent, FERC-approved program on July 20, 1988. *See Chanute III*, 743 F. Supp. at 1456.

The conversion to open-access transportation permitted WNG to provide the Cities and other customers transportation service for gas they purchased from third parties, thereby rendering moot the preliminary injunction. WNG immediately notified the Court of Appeals by filing a

Suggestion of Mootness, since oral argument on the preliminary injunction appeal was scheduled for July 22, 1988. *See Chanute V*, 820 F. Supp. at 1290, Sup. App. at 25a-26a. At oral argument in that Court, the panel requested the parties to attempt to reach agreement on whether the preliminary injunction had become moot. Failing such an agreement, the panel informed the parties that the case would be remanded to the District Court for a determination of the question. *Id.* That day, WNG and the Cities signed and filed the Stipulation which the Cities now constantly refer to as a "settlement." *Id.* In fact, the Stipulation is nothing more than the parties' agreement that the preliminary injunction motion and its appeal could be dismissed.

After dismissal of the preliminary injunction the case returned to the District Court for decision on the merits, and after more than a year of discovery, WNG filed a series of motions for summary judgment. The District Court granted those motions in *Chanute II* and *Chanute III*. Together, those two Orders dismissed all of the Cities' claims, and the Court entered judgment in WNG's favor on July 30, 1990. The Court of Appeals affirmed in *Chanute IV*, and this Court denied the Cities' Petition for a Writ of Certiorari on October 5, 1992, 113 S.Ct. 96, making the judgment final.

Hence, for all their effort and expense, the Cities ultimately received nothing; all their claims were dismissed and the preliminary injunction they did obtain was never implemented. In the face of that wasteful litigation failure, the Cities now ask for an award of attorney's fees in excess of $800,000. The District Court found, as a matter of fact, that "the Cities did not substantially prevail and are not

entitled to attorneys' fees," *Chanute V*, 820 F. Supp. at 1293, Sup. App. at 30a, and the Court of Appeals affirmed. This Court should not further the wastefulness of this litigation by taking its valuable time and resources to review those decisions.

REASONS FOR DENYING THE WRIT

One thing must be made perfectly clear from the outset — the Cities are wrong when they contend that the Court of Appeals held they were not entitled to attorney's fees for the preliminary injunction phase of this case because they did not receive an award of damages. What the Court of Appeals held is that the Cities' antitrust claims had no merit from the day the Complaint was filed. That is more than a question of semantics — both lower courts held essentially, that the preliminary injunction had been improvidently granted. Furthermore, the Cities' arguments in favor of granting the writ are factually flawed. In the first sentence of the argument they flatly state that "the Cities [ ] obtained permanent relief for the future through the Stipulation of July 22, 1988," completely ignoring the District Court's contrary finding of fact, which finding was undisturbed by the Court of Appeals. Without that basic factual assumption, the rest of the Cities' argument simply falls apart.

Ultimately, the Cities' attempt to cobble together cases from disparate, and sometimes mutually exclusive, theories of attorney's fee recovery is fruitless because those cases do not dictate a different result here. Indeed, under the teachings of the very cases the Cities cite, no other result was

possible, for those cases all hold that when a plaintiff receives nothing for its litigation effort, it is not entitled to an award of attorney's fees under any fee-shifting statute. As a result, the Cities have not demonstrated any need for this Court's review and their Petition should be denied.

I. THE COURT OF APPEALS' DECISION IS COMPLETELY IN ACCORDANCE WITH THE LAW AND DOES NOT CONFLICT WITH A PRIOR DECISION OF ANY COURT

The Cities initially rely on *City of Malden v. Union Elec. Co.*, 887 F.2d 157 (8th Cir. 1989), and *Southwest Marine, Inc. v. Campbell Indus.*, 796 F.2d 291 (9th Cir. 1986), for the proposition that a plaintiff can obtain an award of attorney's fees under Clayton Act § 16, 15 U.S.C. § 26, even though it does not obtain an award of damages under Clayton Act § 4, 15 U.S.C. § 15. The Cities claim that the Court of Appeals' decision in this case conflicts with that proposition, but that argument is merely a straw man. The Tenth Circuit did not hold that an award of damages under § 4 was a prerequisite to an award of attorney's fees under § 16, hence the conflict the Cities imagine is illusory. More importantly, the holding in those cases actually dictates the result the Tenth Circuit reached here.

The Cities imply that the plaintiff in the *City of Malden* case was awarded attorney's fees but it was not, and the reasons why it was not also preclude an award to the

Cities.[5] In *City of Malden* the plaintiff sought a preliminary injunction to require interconnection to the defendant's electrical transmission system to allow it to purchase power from third parties at favorable rates. While the case was pending, the parties concluded negotiations which had been ongoing long before the suit was filed which provided for a new contract to allow the access the plaintiff desired. When the case was tried on the merits, the jury returned a verdict for the defendant. There, as here, the municipal plaintiff claimed that the renegotiated contract was partial success in the litigation entitling it to attorney's fees under § 16.

The Court of Appeals held that the "plaintiff may be viewed as a 'prevailing party' if the plaintiff's lawsuit and plaintiff's attorney's efforts were 'a necessary and important factor' in achieving the [service] requested by plaintiff in its motion for preliminary relief." *City of Malden*, 887 F.2d at 165 (*quoting United Handicapped Fed'n v. Andre*, 622 F.2d 342, 346 (8th Cir. 1980). The District Court in that case had found that the new service was the result of the ongoing negotiations, not the litigation, and the Court of Appeals held that finding was not clearly erroneous. Therefore, the plaintiff was not entitled to an award of attorney's fees. That is precisely what happened here. The District Court found, as a matter of fact, that any benefit the Cities received was the result of the conclusion of the ongoing FERC proceedings and not this litigation, and the Tenth Circuit did not disagree with that finding. Hence, the Court of Appeals decision in

---

[5] The Cities' implication about the *City of Malden* case is quite disingenuous since the plaintiff there was represented by the same counsel who represents the Cities here.

this case is not in conflict with the decision in *City of Malden*, but rather closely parallels it.

Southwest Marine likewise is not inconsistent with the Court of Appeals' decision here. In *Southwest Marine*, the plaintiff sought access to a dry dock facility, and while the case was pending, the defendant agreed to give the plaintiff the access it sought. *Southwest Marine, Inc. v. Campbell Indus.*, 732 F.2d 744, 747 (9th Cir.), *cert. denied sub nom, Triple "A" Machine Shop, Inc. v. Southwest Marine, Inc.*, 469 U.S. 1072 (1984). On a later appeal, the Court of Appeals found the plaintiff's claims to be meritorious and remanded to the District Court. While on remand, however, the law in that circuit changed in such a way as to give the defendant a complete defense and the District Court granted summary judgment for the defendant and denied plaintiff's application for attorney's fees. *Southwest Marine, Inc. v. Campbell Indus.*, 796 F. Supp. 291 (S.D. Cal. 1985). The plaintiff did not appeal the summary judgment, but did appeal the denial of its attorney's fees application.

The Ninth Circuit held that, since the plaintiff's case had merit when it was filed and when the plaintiff obtained partial relief, some award of attorney's fees would be appropriate. But that is not the case here. The Cities' claims never had any merit. No new law resulted in their losing on the merits; that loss was the result of fuller examination of a more complete record.[6] *Chanute II*, 1990-1 Trade Cas.

---

[6] The Cities argued below that since "likelihood of success on the merits" was an element of their proof at the preliminary injunction stage, the grant of the preliminary injunction must have been a decision that (continued...)

(CCH) at p. 63,195. Furthermore, the District Court found as a matter of fact that this litigation was not the cause of the Cities receiving transportation. Therefore, the lower courts' decisions in this case are not at all inconsistent with the decisions in *Southwest Marine*.[7]

Next the Cities argue that the Court of Appeals' decision conflicts with this Court's holding in *Farrar v. Hobby*, 506 U.S. ___, 113 S.Ct. 566 (1992), that a plaintiff substantially prevails when it receives relief which "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Petition at 8. The problem with that argument, of course, is that it is dependent on a factual finding that the Cities received something from this litigation which "materially alters" their relationship with WNG. The

---

[6] (...continued)
their claims had merit. But as the District Court pointed out, that preliminary injunction decision was based on the "relaxed" standard employed in the Tenth Circuit under which a plaintiff that has proved it will be irreparably harmed need only demonstrate that its claim on the merits presents a fair ground for litigation. *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980). Therefore, the preliminary injunction order was not a ruling on the merits of the Cities' claims.

[7] Furthermore, the *Southwest Marine* case is of dubious precedential value in the first place. The Ninth Circuit later amended its decision to make perfectly clear that it was based strictly on a finding of fact that the defendant had acquiesced in the plaintiff's demands as a result of the lawsuit. *Southwest Marine, Inc. v. Campbell Indus.*, 806 F.2d 898 (9th Cir. 1986). Then when the court denied rehearing and rehearing *en banc*, four judges dissented, calling the result reached "a substantial miscarriage of justice." *Southwest Marine, Inc. v. Campbell Indus.*, 811 F.2d 501, 503 (9th Cir.), *cert. denied sub nom, Triple A Mach. Shop, Inc. v. Southwest Marine, Inc.*, 484 U.S. 895 (1987).

District Court actually found just the opposite to be true; the transportation service the Cities receive is the result of the FERC regulatory approval process, not this litigation.

In fact, this Court's *Farrar* decision actually supports the Court of Appeals' decision in this case. In *Farrar* the Court required that a plaintiff "obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement," before it can be considered a prevailing party. 113 S.Ct. at 573. Merely obtaining a favorable ruling from a court is not enough: "a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party." *Id.* That is all that can be said of the Cities' case here. They obtained an order which improvidently entered a preliminary injunction, and nothing more. The injunction was never implemented and the Court of Appeals stayed its effect until it was ultimately dismissed.

After that, the District Court and the Court of Appeals held that the Cities' lawsuit had no merit from the outset, and that the injunction never should have been entered. *Chanute VI*, 31 F.3d at 1049 n.13, App. at 16a-17a. Under *Farrar*, that is not enough to entitle the Cities to an award of attorney's fees, and the lower courts' decisions denying those fees is entirely consistent with *Farrar*. *See also Rhodes v. Stewart*, 488 U.S. 1 (1988) (prisoner plaintiffs who were either dead or released at time of judgment could not benefit from it and were not entitled to award of attorney's fees); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) ("Respect for ordinary language requires that a plaintiff receive at least

some relief on the merits of his claim before he can be said to prevail").

Finally, the Cities attempt to create some sort of internal conflict within the Tenth Circuit by complaining that the decision in this case conflicts with the earlier decision in *Dahlem v. Board of Education*, 901 F.2d 1508 (10th Cir. 1990). In *Dahlem* the plaintiff obtained a preliminary injunction requiring his high school to allow him to be a member of the school's previously all-girl gymnastics team, and the school honored the injunction while it appealed. While the appeal was still pending, however, the plaintiff was graduated from the school, thereby making the case moot. In a companion case which did not become moot, the Court of Appeals reversed the district court's injunction.

The Cities claim the holding in *Dahlem* means they should be considered prevailing parties without regard to whether their case had any merit because they obtained a preliminary injunction. But that is not the import of *Dahlem*; the point of that case was that the plaintiff received all the relief he asked for solely as a result of the preliminary injunction, and therefore, rightly or wrongly, he completely prevailed in the litigation. Here the Cities obtained no relief and could not be considered to have prevailed, either on the merits or otherwise. The Court of Appeals correctly noted that important difference and found *Dahlem* readily distinguishable from the present case. *Chanute VI*, 31 F.3d at 1048, App. at 13a.

Thus, the Cities' attempt to find conflicts between the Court of Appeals' decision in this case and various other

decisions is to no avail. Indeed, rather than conflicting with it, those other cases support the result the Court of Appeals reached. Therefore, the Cities have shown no basis for this Court's review and their Petition for a Writ of Certiorari should be denied.

II. THE CITIES DID NOT ESTABLISH THAT THEY ARE ENTITLED TO AN AWARD OF ATTORNEY'S FEES

In the court below, the Cities relied primarily on the line of cases beginning with *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978), and later endorsed by this Court in *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782 (1989), and *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Those cases provide a test for determining when plaintiffs substantially prevail in cases in which no final judgment is rendered because the defendant voluntarily acquiesces in the relief sought by the litigation. In the Tenth Circuit, the test requires the plaintiff seeking attorney's fees to prove two elements:

> (1) that [the] lawsuit is causally linked to securing the relief obtained, and (2) that the defendant's conduct in response to the lawsuit was required by law.

Foremaster v. City of St. George, 882 F.2d 1485, 1488 (10th Cir. 1989), *cert. denied*, 495 U.S. 910 (1990). *See also Luethje v. Peavine School Dist.*, 872 F.2d 352, 354 (10th Cir.

1989).[8] The first element requires that a plaintiff "obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement." *Farrar v. Hobby*, 506 U.S. ___, 113 S.Ct. 566, 573 (1992) (citations omitted).

Obviously the Cities did not receive an "enforceable judgment" against WNG; even the preliminary injunction was stayed (and hence not "enforceable"), and WNG ultimately received a full judgment against the Cities on the merits. Instead, the Cities have argued that the Stipulation between the parties which resulted in the dismissal of their preliminary injunction and WNG's appeal was a "settlement." The District Court found, as a matter of fact, that the Stipulation did not satisfy the first *Nadeau* element, and the Court of Appeals found, as a matter of law, that it did not satisfy the second element. Both are right.

---

[8] Lower courts have articulated a similar test under Clayton Act § 16, requiring the court to examine:

> a) the situation immediately prior to the commencement of suit, and b) the situation today, and [c] the role, if any, played by the litigation in effecting any changes between the two.

F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc., 476 F. Supp. 203, 206 (S.D.N.Y. 1979)(footnote deleted). *See also Harnischfeger Corp. v. PACCAR, Inc.*, 503 F. Supp. 102, 104-05 (E.D. Wis. 1980).

A. The District Court's Decision Was Based Entirely On A Finding Of Fact Subject To A Clearly Erroneous Standard Of Review

The Cities contend that they should have been awarded attorney's fees because, by virtue of the Stipulation entered into by the parties to dismiss the initial preliminary injunction appeal after it had become moot, they supposedly obtained "right[s] that went substantially beyond the limited transportation available to the Cities under WNG's filings at the FERC." Petition at 9. Therefore, they argue, they are like the plaintiff in *Farrar v. Hobby*, 506 U.S. ___, 113 S.Ct. 566 (1992), whom this Court held could be a prevailing party because he obtained an award of nominal damages.

The problem with that argument is that it wholly ignores the fact that the District Court, after hearing evidence from the parties including witnesses called by the Cities, found as a matter of fact that "[t]he Cities have failed to prove their litigation influenced the relationship between WNG and the Cities or affected WNG's behavior toward the Cities." *Chanute V*, 820 F. Supp. at 1293, Sup. App. at 30a.

This Court has often held that, absent "extraordinary reasons," it will not review findings of fact to determine whether they have support in the record. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 98 n.15 (1984); *United States v. Doe*, 465 U.S. 605, 615 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980); *Berenyi v. District Director, INS*, 385 U.S. 630, 635 (1967). Although the Court of

Appeals found it unnecessary[9] to address these fact findings because it affirmed based on other legal grounds, it did acknowledge the evidence in the record upon which that fact finding was based, and which preclude any conclusion that the District Court's findings of fact were clearly erroneous. Hence this Court should not waste its valuable time and resources by reviewing a case which revolves largely around issues of fact best resolved by district courts.[10]

B. The District Court's Finding That The Transportation Service The Cities Receive Is Not The Result Of This Litigation Is Not Clearly Erroneous

The District Court found as a fact that the transportation service which the Cities now receive is not the result of this litigation, but rather of the FERC administrative process which had been under way for more than a year when the Cities filed this lawsuit. The Cities had the opportunity to try to prove otherwise but they simply failed to do so, and the District Court's findings are more than substantially supported in the record. *See, e.g., Royal Crown Cola Co. v. Coca-Cola Co.*, 887 F.2d 1480 (11th Cir. 1989),

---

[9] The Cities' Petition Appendix erroneously reports the Court of Appeals' opinion as using the word "necessary," when in fact the Court of Appeals found the factual review "unnecessary." *See* note 2, *supra.*

[10] *Cf. Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) ("a prevailing party may, of course, 'defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals' "); *Whitley v. Albers*, 475 U.S. 312, 326 (1986) (same); *United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977) (same).

cert. denied, 497 U.S. 1011 (1990)("Royal Crown must put forth some evidence establishing that its litigation actually played a substantial role in the appellant's decision to abandon the acquisitions").

The Cities claim that they "prevailed" by entering into the Stipulation because it allegedly provided for transportation service not available in WNG's open-access transportation program under the RS&A, but that simply was not established in the record. The Stipulation by its own terms makes clear that the Cities obtained nothing more than what they were already entitled to under FERC regulations and the tariffs which the FERC had just approved. Indeed, virtually every clause in the Stipulation spelling out some right of the Cities is modified by reference to WNG's tariff.

> 1. . . . to provide the Cities with firm and/or interruptible transportation service *in accordance with WNG's FERC tariff* . . . .
>
> * * *
>
> 5. The Cities shall be subject to only those charges . . . as are contained in the *rates and procedures in WNG's transportation tariffs on file with the FERC* . . . .
>
> 6. . . . WNG shall submit to the Cities or their agent appropriate transportation

> contract(s) *in accordance with WNG's FERC tariff. . . .*

App. at 23a (emphasis added). Thus, the Stipulation made the tariff, as approved by FERC, the mode of service to be provided.

WNG had always made clear to the Cities that it was principally concerned with phasing out sales service to its large distribution customers, and that once agreements were reached with those customers, the smaller municipal distributors like the Cities could have whatever service they wanted. Indeed, the District Court noted that WNG's witnesses testified at the preliminary injunction hearing that once the RS&A was approved, "WNG would provide the transportation service sought by the Cities." *Chanute V*, 820 F. Supp. at 1293, Sup. App. at 30a.

The Cities' argument that the RS&A did not expressly guarantee them immediate 100% open-access within its four corners misses the point for the RS&A also did not prohibit that service; that right was inherent in the FERC's open-access orders and regulations, and no express statement providing for it was necessary. In fact, WNG allowed other customers who were not plaintiffs in this antitrust case to terminate their sales contracts and obtain 100% transportation, and the FERC approved those terminations in the same order in which it approved abandonment of sales service to the Cities. *See Williams Natural Gas Co.*, 48 F.E.R.C. (CCH) ¶ 61,057 (1989).

The fact that other customers obtained the same "benefit" as the Cities demonstrates that the transportation the Cities received is a result of the FERC proceedings, not this litigation. Other customers who did not sue WNG received the same benefit as the Cities, leading to the conclusion that the litigation had nothing to do with the service offered them by WNG. At the very least, that is a reasonable finding for the District Court to reach, and one which is not clearly erroneous.

C. The Cities' Antitrust Claims Were Without Merit From The Outset

The Cities attempt to avoid the second element of the test for substantially prevailing, "that the defendant's conduct in response to the lawsuit was required by law," by reference to *Dahlem*'s holding that the plaintiff there was a prevailing party without regard to the merits of his case. As discussed earlier, *Dahlem* has no bearing on this case since the plaintiff there received all that he asked for without any court ever determining the merits of his case. That is not what happened here.

The District Court and the Court of Appeals have both determined that the Cities' claims had no merit from the time the lawsuit was filed. The Court of Appeals stated it flatly: "Our rejection of the substance of the cities' antitrust claims amounts to a statement that they lacked merit from the inception of the suit, regardless of any preliminary determination by the district court." *Chanute VI*, 31 F.3d at 1049, n.13, App. at 17a. The District Court, too, was direct in its expression about the merits of the Cities' claims: "I

can say, given events that transpired and for other reasons, had I been privy to that which did transpire, at the time I took up the application for injunctive relief, I would have denied it." Transcript of hearing on Cities' Application for attorney's fees, Respondent's App. at 1a.[11]

This is not a case like *Southwest Marine* where the plaintiff's claims had merit when they were filed, but only later became meritless because of an intervening change in the law. Nothing changed from the time the Cities' filed this lawsuit until judgment was entered in WNG's favor and affirmed. The claims had no merit then and they have no merit now. In short, as the defendant argued in *City of Malden*, the Cities receive transportation in spite of this lawsuit, not because of it. *See* 867 F.2d at 165. Therefore, the lower courts were right to deny the Cities' attorney's fees application, and the case does not warrant this Court's review.[12]

---

[11] WNG has included as an appendix to this Brief a transcript of the District Court's oral ruling at the conclusion of the hearing on the Cities' Application for Attorney's Fees.

[12] In the courts below the Cities argued that they could satisfy this second element of the *Nadeau* test simply by demonstrating that their lawsuit was not "frivolous" when filed, relying on certain language in the Tenth Circuit's decision in *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986). That court, however, has recently clarified its position in *Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Social & Rehabilitation Services*, 31 F.3d 1052, 1055 (10th Cir. 1994), a decision by the same panel that decided this case, where the Court of Appeals held that its language in *Supre* was merely one example of a case which would not merit attorney's fees. Hence, if the Cities attempt to resurrect the argument in a Reply Brief, it now has no basis in the Tenth Circuit, if it ever did.

CONCLUSION

This case, even more so than *Southwest Marine*, is described by Judge Noonan's concurrence in that case in which he stated:

> Most people if told you could bring a lawsuit, lose it, and then ask your opponent to pay you at least $363,000 in attorney's fees would think they had heard a joke or an extravagant parody of the mysterious ways of that old ass, the law.

796 F.2d at 292. The Cities filed this lawsuit, lost it because their claims had no merit, and now want WNG to pay them more than $800,000 in attorney's fees. They are not entitled to those fees and this Court should not waste its valuable resources hearing this case. Therefore, WNG respectfully requests that the Cities' Petition for a Writ of Certiorari be denied.

RESPECTFULLY SUBMITTED,

FEBRUARY 3, 1995

DONALD W. BOSTWICK
TERESA JAMES
ADAMS, JONES, ROBINSON
& MALONE, Chartered
600 Market Centre
155 North Market
P.O. Box 1034
Wichita, Kansas 67201
(316) 265-8591

JOHN T. SCHMIDT *
C. KEVIN MORRISON
CONNER & WINTERS
2400 First National Tower
15 East Fifth Street
Tulsa, Oklahoma 74103
(918) 586-5711

Attorneys for Respondent

DAVID J. BATOW
WILLIAM J. SEARS
THE WILLIAMS COMPANIES, INC.
One Williams Center
P.O. Box 3288
Tulsa, Oklahoma 74101
(918) 588-4229

* Counsel of Record

APPENDIX

* * * *

The Court: Okay. Probably be well advised to say with that I will repair and reflect on this and prepare a full opinion and announce the decision, and I do intend to put in place a brief opinion. But, Mr. Wheatley, I will tell you now I'm going to deny the fee for having prevailed at the preliminary injunction stage, and in saying that, I certainly take no heart in denying good lawyers attorney fees.

Certainly is true that: you did prevail at that time in that I did indeed put in place an order that required Williams to open its lines to transport gas, and it's true that in due course you prevailed, in that Williams did, in fact, open its lines, but I'm satisfied that the problem here is that Williams' acts are simply not related to this Court's order. It had appealed this Court's order; it had been stayed. And, as an aside, I can say, given events that transpired and for other reasons, had I been privy to that which did transpire, at the time I took up the application for injunctive relief, I would have denied it. More importantly, I'm satisfied that what had occurred was the Revised Stipulation and Agreement which FERC had approved, thrust of which then did clear the way for Williams to become a non-discrimination open access transporter under a permanent FERC-approved program. The stipulation that was negotiated at Colorado at the time this matter had been set for hearing clearly provides that on July 20th, Williams accepted a blanket open access certificate under Section 7 of the Natural Gas Act to implement the FERC's approval of Williams' Revised Stipulation and Agreement and Williams will provide and the Cities wish to obtain from Williams firm and/or interruptible transportation service for a hundred percent of their natural gas requirements, et cetera. That

language spells out the reasons that you prevailed, and the reasons were that Williams has finally prevailed with FERC and that they now have the open access certificate which permits them to open those lines.

I'm sure it is, sir, if that was not the case, then the stipulation would simply say as you came forward before the Tenth Circuit that Williams now agrees that the terms and conditions of the Court's order will be implemented. That was not the case, for what was agreed was that the appeal would be dismissed and that the injunction order would be withdrawn. I'm not persuaded then in anyway that Williams acted upon the terms of this Court's order, but for the reasons I indicated, and as a consequence then that action was for the reasons that I indicated and not because you prevailed here.

So, I'm going to deny the fee application under the Act. As I indicated, I will put in place a brief order that will spell it out a little better than what I have said, but will adopt what is made a part of this hearing.

Very well. We'll be in recess.

--**-*-*-*-*-*-*

(End of Proceedings.)